

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 84 of 1998

in

COMPANY PETITION No 244 of 1997

WITH

COMPANY APPLICATION No 83 of 1998

in

COMPANY PETITION No 243 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE Sd/-

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes

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2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?
No

UTI BANK LIMITED

Versus

DIAMOND OIL INDUSTRIES PVT.LTD

Appearance:

MR RM DESAI for the Applicant (in both matters)

MR BJ SHELAT WITH MR ASHOK L SHAH for Respondent
(in both matters)

CORAM : MR.JUSTICE H.L.GOKHALE

Date of decision: 06/04/98

ORAL JUDGEMENT

Heard Shri R.M.Desai for the applicant in both the matters and Shri B.J.Shelat with Shri Ashok L. Shah for the respondent in both the matters.

2. Company Petition No.244 of 1997 is filed by UTI Bank Ltd., a public limited company seeking winding up of the respondent Diamond Oil Industries Pvt. Ltd. in view of the respondent's not honouring the statutory notice served on them under the Companies Act, 1956. The notice claimed the outstanding dues of Rs.3,75,38,161.51 along with interest at the rate of 24.5% from 25.1.1997 till payment. Hynoup Food & Oil Industries Ltd. is the guarantor for repayment of this amount and which is a sister concern of Diamond Oil Industries Pvt. Ltd. Hence another separate petition being Company Petition No.243 of 1997 is filed against this guarantor, after serving necessary notice on the guarantor which was also not honoured within the statutory period.

3. Both these petitions are dated 16.6.1997. They are signed by Shri R.M.Desai, learned advocate appearing for the petitioner in both these matters, and they are verified by one R.Ashok Kumar, who was the then Deputy General Manager incharge of Ahmedabad Branch of the petitioner. A substantive reply has been filed to both these petitions. Apart from merits of the case, it has been contended on behalf of the respondents that it is not clear as to whether prior to filing of both these petitions, any decision had been taken by the Board of Directors of the petitioner Bank to file these winding up petitions and secondly that the person concerned who has verified the petitions did not have the authority to verify the petitions on behalf of the petitioner Bank. It is for this limited purpose that both the applications No.84 and 83 of 1998 have been filed subsequently wherein the prayers are twofold:

(a) that the applicant be granted leave and permission to amend the petition as mentioned in Annexure-I thereto and

(b) that the applicant be granted leave and permission to file affidavit verifying the petition in Form No.3 of the Companies (Court) Rules, 1959.

4. These applications have also been opposed by filing replies on behalf of the concerned respondent wherein again two submissions have been specifically raised, namely:

- (1) There was no decision to initiate any such proceedings against the respondent company by the Board of Directors, and
- (2) The person concerned who is seeking authority to file the affidavit does not have authority to sign the petition or other legal proceedings.

In view of these objections, a substantive affidavit has been filed by one Shri S.K.Chakrabarti who is the Deputy General Manager and Head of the Ahmedabad Branch. This further affidavit affirmed on 2.4.1998 is filed in both the main petitions explaining the Bank's position in this behalf.

5. The amendment which is sought in Annexure-I to these two applications No.83 and 84 of 1998 seeks permission amongst others for Shri S.K.Chakrabarti, Deputy General Manager to affix his signature on the main petitions. Thus, permission is sought now to sign the main petitions through Shri S.K.Chakrabarti, Deputy General Manager and also to file an affidavit verifying the petitions in the concerned form which is also to be filed by Shri S.K.Chakrabarti.

6. The documents which are annexed to the further affidavit of Shri S.K.Chakrabarti affirmed on 2.4.1998 and filed in the main petitions seek to reply the above-referred two contentions raised on behalf of the respondents. Firstly, a certified true copy of the Resolution passed by the Board of Directors of UTI Bank Ltd. at its Board Meeting held at Mumbai on 14.8.1996 duly certified by one Shri P.J.Oza, Company Secretary on 26.3.1998 is annexed as Annexure-A to the affidavit of Shri S.K.Chakrabarti. This Resolution approves revised scheme for delegation of powers in respect of committee of Directors, Chairman & Managing Director and the Executive Director for two purposes, namely:

- (1) Sanction of advances, underwriting support and related matters, and

(2) General matters.

The scheme for delegation of financial powers concerning General Matters is annexed on the next page. In that, Item No.11 reads as follows:

"To institute, defend legal proceedings when suit amount does not exceed_____"

Against these various items, the amounts upto which various authorities can exercise their powers is mentioned. Thus, as far as this item No.11 is concerned, for our purpose, the power of the Chairman is mentioned as upto Rs.500 lacs.

7. Thereafter, a proposal dated 14.3.1997 put up to the Chairman & Managing Director by one S.K.Parab, Deputy General Manager (Credit) through the Executive Director and the General Manager (Credit) is annexed as Annexure-B. The last two paragraphs of this proposal read as follows:

"As our efforts in recovery of dues failed and the company did not arrange for inspection of the oil which is kept in Mumbai in the custody of Western India Oil Distributing Co. Ltd. we have no other alternative but to file recovery suit. We therefore seek your approval to file money suit against DOIL guarantors Western India Oil Distributing Company Ltd. (the owners of tanks in whose custody the oil is kept) and Narendra Forwarders, the clearing agents. With a view to accelerate the recovery process, we may be permitted to file winding up petition in Gujarat High Court against DOIL and Hynoup Food and Oil Industries Ltd.

As the claim amount being Rs.368 lacs plus interest, CMD is requested to accord sanction for filing of money suit against the above mentioned parties and also for filing winding up petition in the Gujarat High Court against DOIL and Hynoup Foods and Oil Industries Ltd. for recovery of the Bank's dues".

This proposal is approved by the Chairman & Managing Director and his approving signature dated 14.3.1998 is seen at the top of this Annexure-B along with the initials of the Executive Director and the General Manager (Credit). Relying upon these documents, Shri

Desai submits that by the General Resolution of the Board of Directors passed on 14.8.1996, the power to institute the necessary legal proceedings (where the amount did not exceed Rs.500 lacs) was conferred upon the Chairman, and since the amount involved in the present transaction between the petitioner and the respondent was 360 lacs plus as mentioned in the letter of Shri Parab, the proposal was put up to the Chairman and he has sanctioned the same.

8. As far as the authority to sign the necessary pleadings on behalf of the bank is concerned, the power of attorney of Shri S.K.Chakrabarty is annexed. Clause (8) thereof reads as follows:

"8. In respect of any person, firm, society, company, corporation, association, syndicate or body corporate to apply or petition for adjudication as insolvent or bankrupt or for winding up and prove and debt or claim in the bankruptcy or insolvency or winding up and to take any proceedings and appear or cause an appearance to be entered for the Bank in any proceeding for or in or after any such bankruptcy or insolvency or any winding up and to make, sign, verify, affirm, swear, declare and file any petition, affidavit, declaration, application or other claim or affidavit in proof of any debt due or claimed to be due to the Bank and to attend and vote or to give a proxy to or authorise any employee or employees of the Bank or any other person to attend and vote at any meeting of creditors in any composition or in any insolvency or bankruptcy or winding up proceedings and to propose, second or vote for or against any resolution or resolutions at any such meeting and to appear at any public examination or any application for discharge and to vote and/or to take part in appointment of any inspector, trustee or liquidator or receiver or committee and generally to act for the Bank in all insolvency or bankruptcy or winding up proceedings or authorise any employees of the Bank or any other person to so act in the premises."

Shri Desai therefore submits that Shri Chakrabarti does have the necessary authority to sign the pleadings on behalf of the Bank.

9. Shri Desai, learned Counsel appearing for the

applicant submits that, firstly, there is no need for any Resolution for a public limited company to institute a proceeding for winding up and in that behalf he relied upon a judgment of the Division Bench of the Madras High Court 25 (1955) Company Cases 338 in STATE OF MADRAS v. MADRAS ELECTRIC TRAMWAYS (1904) LTD. wherein it has been held with respect to Section 166 of the Companies Act 1913 (which is pari materia with Section 433 of the Companies Act, 1956) as follows:

"Under Section 166 an application to the court for winding up of a company can be presented by the company or by any creditor or contributory, and there is nothing in section 271 or any other provision of Part IX of the Act which excepts this provision of section 166 in the case of an unregistered company. There is nothing in section 162 or section 166 of the Indian Companies Act to lead to the inference that unless a company has resolved by a special resolution at a general meeting it cannot present a petition to the court to wind up the company."

Shri Desai, learned Counsel appearing for the applicant Bank submits that, in any event, to satisfy the conscience of the court the documentary material has been placed before the Court which is more than sufficient. He has further submitted that assuming that there were any deficiencies in the petitions when they were filed initially, the applicants ought to be permitted to cure them considering that they had a substantive cause to canvass.

10. Shri Shelat, learned Counsel for the respondent submits that the documents which were placed on record along with the affidavit of Shri Chakrabarti do not advance the case of the applicants any further. He submits that the particular wording has to be read strictly, which reads as follows:

"To institute, defend legal proceedings when suit amount does not exceed_____"

Shri Shelat submits that a winding up petition is not contemplated in this item. Shri Shelat secondly submits that at the highest it could be said that by the Resolution dated 14.8.1996 the Board of Directors had authorised the Chairman to take the necessary step. But, the Chairman cannot further delegate the authority to somebody else. Besides, he further submits that the whole proposal seems to have been moved by Shri Parab,

Deputy General Manager (Credit) and now Shri Chakrabarti has come into picture. He further submits that as far as the power of attorney in favour of Shri Chakrabarti is concerned, though his name has been mentioned therein, his name has been described as 'S.K.Chakrabarti, Deputy General Manager presently working at Hyderabad Branch.' Therefore, he submits that Shri Chakrabarti has no authority to sign the petition and affirm the affidavit concerning this petition which is being filed in Ahmedabad.

11. Shri Shelat relied upon two judgments in this behalf. Firstly, 70 (1991) Company Cases 388 - NIBRO LTD. v. NATIONAL INSURANCE CO. LTD. That was a matter wherein the authority of one G.Jhajharia to sign the plaint and to verify the same against the respondent Insurance Company was challenged. No Resolution passed by the company authorising this Jhajharia to institute the suit was produced before the court. A learned single Judge of the Delhi High Court in the facts of that case held as follows:

"It is well-settled that under section 291 of the Companies Act 1956, except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting, in all other cases the board of directors are entitled to exercise all its powers. Individual directors have such powers only as are vested in them by the memorandum and articles.

It is true that ordinarily the court will not non-suit a person on account of technicalities. However, the question of authority to institute a suit on behalf of a company is not a technical matter. It has far-reaching effects. Order 29, Rule 1 of the Code of Civil Procedure 1908 does not authorise persons mentioned therein to institute suits on behalf of a corporation - it only authorises them to sign and verify the pleadings on behalf of the corporation. Thus, unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Such power can be conferred by the board directors only by passing a resolution in that regard."

12. Secondly, Shri Shelat also relied upon the judgment of a single Judge of the Madras High Court

reported in 80 (1994) Company Cases 558 in K.N. SANKARANARAYANAN v. SHREE CONSULTATIONS & SERVICES PVT. LTD. wherein also it has been held that, unless power to institute a suit is specifically conferred upon a particular director, he has no authority to institute a suit on behalf of the company. In that case also, no such resolution had been placed before the court and the above- referred judgment of the single Judge of the Delhi High Court was referred to and followed.

13. In the facts of the present case as narrated above and having considered the submissions advanced by both the learned Counsel, here it is seen that on the proposal being moved by the Deputy General Manager (Credit) to institute a winding up petition, the Chairman & Managing Director had approved it way back on 14.3.1997. It is thereafter only that the petition has come to be filed. The Resolution passed by the Board of Directors giving the necessary authority has been placed on record. Hence, in the facts of this case, without going into the submissions raised by Shri Desai (that for filing of a winding up petition under the relevant section no such requirement can be insisted upon) and countered by Shri Shelat, it is seen that there is a valid resolution passed by the Bank and therefore no fault can be found in the decision of the Bank to institute the winding up petition. As far as the authority of Shri Chakrabarti to sign the pleadings is concerned, though it describes him as S.K.Chakrabarti, Deputy General Manager, presently working at Hyderabad, his job is transferrable and he is presently working as the Head of the branch at Ahmedabad and the authority in favour of Shri S.K.Chakrabarti is certified to be valid and true by the Company Secretary of the UTI Bank. Inasmuch as Shri Chakrabarti continues to be the Deputy General Manager and since he is having authority and also since he is the Head of the Ahmedabad Branch, there is nothing wrong if the Bank desires him to sign the petition and to file affidavit in support thereof. Mr.Shelat submits that there is no specific resolution in favour of Shri Chakrabarti. Now, in this connection it cannot be lost sight of that in what manner the internal management of a company ought to be conducted is a matter for its authorities to look into unless there is something which is violative of any statutory provision or any statutory guidelines (concerning the banks, for example as in the present case). In that view of the matter, in my view, there is nothing improper in the decision of the Bank to institute the proceedings nor in their decision to authorise Shri S.K.Chakrabarty to sign and affirm the petition.

14. Although the petition was filed in June 1997, it is being signed and affirmed by a proper person as late as in April 1998. Such a course of action has been approved by the Division Bench of the Bombay High Court in the case of WESTERN INDIA THEATRES LTD. v. ISHWARBHAI SOMABHAI PATEL reported in AIR 1959 Bombay 386 when a Division Bench of the Hon.'ble Chagla C.J. and S.T.Desai, J. observed in para 16 as follows:

"Now, the question is, what is the legal consequence of a petition not being properly signed by the petitioner. In our opinion, this is a mere irregularity which can be cured at any time. That is the view also taken by Mr.Justice Baker in the case to which reference has been made by us, and also in Lingagouda Marigounda v. Lingangouda Fakirgouda 54 Bom LR 829: (AIR 1953 Bom.79). We are told that the petitioner himself is present in court and he is prepared to sign the petition if we direct him to do so. If the petitioner signs the petition, then the flaw which rendered the petition bad or made it not maintainable disappears. The only objection to the position is that it is signed by an agent who is not a recognised agent. But if the petitioner himself signs it, then no further question arises with regard to the maintainability of the petition. We will therefore direct that the petition should sign the petition in court".

15. Shri Shelat submitted that the correct course for the petitioner would be to withdraw these two petitions with liberty and to file two fresh petitions for the same cause of action after curing all these deficiencies. The very result can be obtained by making amended petitions effective from the date on which the amendment is carried out. Shri R.M.Desai, learned Counsel appearing for the applicant has no objection to this course being adopted. As far as this aspect is concerned with respect to the provision under section 171 of the Companies Act 1913 (which is pari materia to Section 446 of the present Act), in the case of BANSIDHAR SHANKARLAL v. MOHD. IBRAHIM reported in 41 (1971) Company Cases 21, the Hon.'ble Supreme Court considered somewhat similar situation with respect to such a sanction being granted subsequently. It observed as follows:

"Alternatively, assuming that sanction under section 179 did not dispense with the leave under section 171, that there was nothing in the Act

which made leave under section 171 a condition precedent to the institution of a proceeding in execution of a decree against the company. Failure to obtain leave before institution of the proceeding did not entail dismissal of the proceeding: the suit or proceeding instituted without leave of the court would be ineffective until leave was obtained, but once leave was obtained the proceeding would be deemed instituted on the date of granting leave."

16. In my view, the same approach can be fruitfully adopted in the present case. As stated above, Shri Desai, learned Counsel appearing for the applicant has no objection to that course. In the circumstances, amendment when carried out will be effective from the date on which it is carried out. The amendment will not relate back to the date of filing of the petition and the amended petition will be deemed to have been accepted on the date on which the amendment is carried out. In the facts of the present case, it is also relevant to note that no orders have been passed as such prejudicing anybody during this period, namely, from 16.6.1997 (when the two petitions were filed) till passing of this order.

17. In the circumstances, both these Company Applications Nos.83 of 1998 and 84 of 1998 are allowed and the prayers (a) & (b) therein are granted subject to the aforesaid rider, namely that the amended petitions will be considered as filed on the date on which the amendment is carried out.

18. Shri Shelat seeks stay of this order which Shri Desai opposes. In my view, the ends of justice would be met if the actual carrying out of this amendment is deferred till 20th April 1998 within which period the respondent can obtain stay of this order if they deemed it fit. The respondents need not suffer technically due to amendment having been carried out in the meanwhile. The aforesaid amendment will therefore be not carried out until 20th April 1998. Shri Shelat states that in view of this direction he does not press for stay of this order at this stage.

19. The applicants will of course be at liberty to carry out the amendment and file affidavit on 20th April 1998 if there is no stay of this order obtained in the meanwhile. Company Petitions No.244 and 243 of 1997 to come up on 21.4.1998 for further hearing.

20. Company Applications No.83 and 84 of 1998 are

accordingly allowed in above terms though without any
order on costs.

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[KMG Thilake]